No. 14,857

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD YAW, also known as Dickyman,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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STATEMENT OF JURISDICTION.

The Appellee agrees with the Appellant's statement concerning the pleadings and jurisdiction.

STATEMENT OF FACTS.

The Appellee disagrees with Appellant's Statement of Facts.

Essentially the facts as presented in this case in their most favorable light to the Government are as follows:

On September 30, 1954, at about 3:00 P.M., John Cho, an undercover Police Officer, together with a Special Employee of the Bureau of Narcotics, talked with the defendant, Richard Yaw, in the vicinity of Lanikila Food Center (Tr. pp. 15-16). Richard Yaw was at that time sitting in Lanikila Park, directly across the street from Lanikila Food Center (Tr. p. 16). The Special Employee approached Richard Yaw and brought him to the car in which the undercover Police Officer was sitting. There, in the exact words of the undercover Police Officer: "I told him what my purpose was, to purchase marihuana cigarettes, and he told me that he did not have any with him, that his brother, Robert, could get some for me." (Tr. p. 17). Upon further questioning, the undercover Police Officer stated: "Well, he said Robert was not in because he went fishing for the afternoon, and he told me to come back that evening and that Robert could get some for me." (Tr. p. 17). Further, Officer Cho testified concerning an appointment with Robert Yaw that he had made with Richard Yaw: "And so I made an appointment through Richard with Robert to purchase marihuana cigarettes. So I made an appointment for 7:00 P.M. that evening . . ." (Tr. p. 17).

The Undercover Police Officer then left the vicinity of Lanikila Food Center and called Agent Bautista of the Bureau of Narcotics for further instructions. He was instructed to return at 7:00 P.M. and attempt to make a buy from Robert Yaw (Tr. p. 17). He did return at 7:00 P.M. (Tr. p. 17). Further, he testified

as follows concerning the initial meeting with Robert: ". . . and I walked up to Robert and I told him I was the fellow who talked to Richard that afternoon about marihuana cigarettes, and Robert showed an indication that Richard talked to him that afternoon. And he told me, 'Let's wait a while.' So I did . . ." (Tr. p. 17).

Officer Cho further testified that September 30, 1954 was the first time that he had ever seen Richard Yaw or Robert Yaw (Tr. pp. 82-83). As pointed out in the Brief of the Appellant, an inference from the above facts was drawn that the appointment was made and effectuated by Richard Yaw with his brother Robert for 7:00 P.M. and that, as appears from the Transcript, Robert and one Edward Joseph Peltier thereafter sold ten (10) marihuana cigarettes to Officer Cho that evening.

SUMMARY OF ARGUMENT.

The Appellee contends that there was substantial evidence to support the verdict of the jury under 18 U.S.C., Section 2, and that the trial judge did not err in admitting as evidence ten (10) marihuana cigarettes. It is contended that in order to prove that a person is guilty under Section 2, it is necessary to prove that there is also a guilty principal. In this case the Appellee had two ways in which to prove that there was a guilty principal. Both of them were used. Appellant objects to the fact that in order to show that the principal, Edward Joseph Peltier,

was guilty, that ten (10) marihuana cigarettes were used to show commission of the offense as contemplated by Section 2593(a) of Title 26, U.S.C.

ARGUMENT.

As has been related above the facts concerning the Appellant have a different cast to them when viewed in their most favorable light. Considering whether there is substantial evidence to sustain the verdict this is the standard which must be used.

The case which most favors the Appellant and which is heavily relied upon by him is *U. S. v. Moses,* 220 F. (2d) 166 (Appellant's Brief p. 6), at page 169 it is stated, "Moreover, emphasis on those facts which show collaboration and association is characteristic of judicial analysis in those cases where convictions of aiding and abetting have been sustained (and authorities cited)".

The distinguishing characteristic of *U. S. v. Moses, supra,* is the emphasis placed upon association with the undercover officers rather than with the defendants. But here the situation is reversed. Richard Yaw is Robert Yaw's brother. Here Richard made an appointment for a meeting with his brother (Tr. p. 17); his brother kept the appointment at the appointed place and time (Tr. p. 17). Brother Robert was aware that the undercover police officer would be there. There was no surprise—no negotiations, it was just a matter thereafter of securing the mari-

huana (Tr. p. 17). Further there is one important bit of evidence which needs emphasis. Officer Cho had never met nor seen either Richard or Robert Yaw prior to September 30, 1954 (Tr. pp. 82, 83).

Consequently, we have here what might be termed in the words of Third Circuit the proper association of the defendant with the principal actors in the offense Robert Yaw and Edward Peltier.

Appellant emphasizes that all the Appellant was guilty of doing if anything was aiding and abetting an aider and abettor. However, it is not necessary for an accessory to know the person procured, *Morei v. U. S.,* 127 F. (2d) 827, nor is it necessary that the accessory communicate directly with the principal, but this may be done through a third person as was done here. *U. S. v. Pritchard* (D.C. D.C. 1944) aff., 145 F. (2d) 240.

Referring to the cases cited and relied upon by the Appellant, Appellee wishes to comment on each.

U. S. v. Moses, supra, has been discussed herein and it has been shown that the facts distinguish it from the facts herein. The association here is with the other defendants rather than with the police officers. As has been pointed out *supra* this case lends support to Appellee's position.

U. S. v. Peoni, 100 F. (2d) 401, 402, (2d Cir. 1938) sets out a test for aiders and abettors which was to some extent approved in *Nye & Nissen v. U. S.,* 336 U.S. 613, 619. In *Peoni,* however, there is an interesting preamble to the statement at page 402, "It will

be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct, . . ." In *Nye & Nissen, supra,* at page 620, the Court states, "Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing." Further Appellant relies on the fact situation in the *Peoni* case. Even a casual study will show that the facts therein have little or no relation to the facts of this case. *Peoni's* factual situation embraced a series of crimes. There the perpetrator of the first offense was attempted to be linked with the perpetrator of the third offense. Consequently, there is really no comparison to be made. For if there was insufficient evidence to allow the case to go to the jury (point 1) then there must have been insufficient evidence for the jury to return a verdict of guilty (point 2). Points 1 and 2 of Appellant's argument in reality cover the same ground that there was insufficient evidence.

It is the position of Appellee that neither point is well taken and that both cases cited by Appellant and by Appellee bear out this contention. To further bolster this argument this court is respectfully referred to 18 U.S.C. 2(b). It is the contention of Appellee that this section opens up a separate field separate and apart from aiders and abettors and serves to give further grounds for sustaining the judgment herein. *U. S. v. Chiarella* (2d Cir. 1950), 184 F. (2d) 903, modified on other points 187 F. (2d)

12, reargument denied 187 F. (2d) 70; vacated as to sentencing [187 F. (2d) 70], 341 U.S. 946; cert. denied as to 184 F. (2d) 903, 341 U.S. 956. The *Chiarella* case, 184 F. (2d) 903, states:

> Before the amendment of §2 in 1948, the last and an authoritative expression as to what constituted criminal liability was that "in order to aid or abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' "[11]

[11]Nye & Nissen v. U.S., 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919; International Brotherhood v. N.L.R.B., 2 Cir., 181 F.2d 34, 38, 39.

> To do that involves much more than merely "causing an act to be done," as we pointed out at length in United States v. Falcone.[12] Unless

[12]2 Cir., 109 F.2d 579, 587; affirmed 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128.

> we beg the question by importing in to the word, "cause," the limitations of "abet," "aid" or "procure," "causing an act to be done" covers any acts which are necessary steps in the events that result in the crime; and that is equally true *pro tanto,* though we limit the steps to those which the actor knows to be likely so to result; for, even with that limitation there are many situations in which one may "cause" the crime, and yet not "abet," "aid" or "procure" its commission.

It is observed that this case puts a new slant on Appellant's participation. "Causing an act to be

done" covers any acts which are necessary steps in the events that result in the crime. It would seem to the Appellee that to produce the prospect and to make the necessary appointment are certainly necessary steps that result in the crime, even with the limitation to "those events which the actor knows are likely to result." Neither can it be said that the Appellant did not know that his brother even by himself or in concert with another would consummate a deal concerning marihuana.

It is contended that under either theory that the evidence is sufficient to sustain the verdict of the jury.

Point III of Appellant's brief raises the point that prejudicial error was committed in admitting in evidence the ten (10) marihuana cigarettes. It is essential that in order to convict a person under 18 U.S.C. 2 that there must be a guilty principal. In this case the Government had two ways to prove this. Both were used. The principal was proved guilty by evidence to all the essentials of the offense. It is essential that the marihuana cigarettes were part of this proof. How can marihuana be acquired and obtained unless there is marihuana? Secondly, the conviction of the principal was shown and that also is prima facie evidence of the principal's guilt. *Colasacco v. U. S.* (10th Cir. 1952), 196 F. (2d) 165.

CONCLUSION.

The evidence as viewed in its most favorable light establishes that Appellant aided and abetted the principal herein and he also "caused an act to be done," which was necessary to the commission of the offense. The admission of the ten (10) marihuana cigarettes may have been prejudicial to the Appellant but it was not error since it was part of the proof of the guilt of the principal. It is submitted that the judgment should be affirmed.

Dated, Honolulu, T. H.,
October 3, 1955.

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